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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1065

J. B. McBETH, INDIVIDUALLY AND AS NEXT FRIEND OF ROGER McBETH, *Petitioner*

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent*

Response to Petition for Writ of Certiorari

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v.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent*

Response to Petition for Writ of Certiorari

The Texas and Pacific Railway Company, Respondent, respectfully files this response to the petition for writ of certiorari filed in this Honorable Court by J. B. McBeth, Individually and as Next Friend of Roger McBeth, seeking review of the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

OPINION

The opinion in this cause is reported in 414 S.W. 2d 45.

JURISDICTION

Petitioner initiated proceedings in this cause by filing a petition in the 153rd Judicial District Court

of Tarrant County, Texas, seeking damages as the result of a collision between one of Respondent's trains and Petitioner's automobile driven by Petitioner's son, Roger McBeth (Tr. 2). Petitioner requested a jury trial and paid the required fee (Tr. 209). Respondent moved for summary judgment in its favor based upon all pleadings on file in the cause, all interrogatories and requests for admissions and answers thereto, the affidavits in support of Respondent's motion and all other instruments properly before the Court (Tr. 158-161). At the hearing on the motion for summary judgment, in addition to hearing the arguments of Counsel in support of their respective positions, Counsel for Petitioner requested the Court's permission to call Andrew J. Renaker, a witness to the collision, to the witness stand and make his testimony a part of the record before the Court (Tr. 185). Respondent did not object and the Court granted Petitioner's request. Respondent's motion for summary judgment was granted (Tr. 185-187), and upon Petitioner's written request (Tr. 188), the Court consented to make findings of fact and conclusions of law (Tr. 190-200). Petitioner duly and timely prosecuted an appeal through the Appellate Courts of the State of Texas without success.

Petitioner erroneously seeks to invoke the jurisdiction of this Court under 28 U.S.C., § 1257(3) on the grounds that the granting and affirming of Respondent's motion for summary judgment deprived him of the right of trial by jury.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

To Petitioner's list of constitutional provisions, statutes and rules involved, Respondent would add:

Statute:

Article 6701d, § 86 (a) and (d), Revised Civil Statutes of Texas:

"Sec. 86. Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when:

"(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;

* * *

"(d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

Federal Rule of Civil Procedure:

28 U.S.C., Rule 56(b) and (c):

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

POINTS OF REPLY

1.

The action of the trial court granting Respondent's motion for summary judgment and its affirmance by the Appellate Courts did not violate any right of trial by jury since this was a proper case for summary judgment in that the undisputed facts established as a matter of law that Roger McBeth was guilty of both statutory and common law contributory negligence, and no issue of fact was raised for the consideration of a jury militating against such negligence, thus precluding any possible recovery from Respondent.

2.

The due process clause of the Fourteenth Amendment does not encompass the Seventh Amendment right of trial by jury and, therefore, no federal constitutional issue nor federal question is before this Honorable Court.

STATEMENT OF THE CASE

Undisputed Facts in the Record

On the morning of the collision, January 14, 1964, Roger McBeth, who was almost 18 years of age and had been living in the City of Grand Prairie for 10 years and nine months immediately preceding that date, left his home to attend classes at Arlington State College (Tr. 68, 69, 72). He had enrolled at Arlington State College almost four months prior to that date and had been attending classes five days a week during that time, said classes beginning at 8:00 o'clock A.M. on each of those days (Tr. 69, 72).

The weather that morning was clear and cold (Tr. 176-178). Visibility was unlimited (Tr. 176-178).

In traveling to school that morning, Roger McBeth proceeded west on West Main Street (U.S. 80) toward the Southwest 23rd Street intersection and crossing, which was the place of the collision (Tr. 2, 99). West Main Street (U.S. 80) runs east and west through the City of Grand Prairie, paralleling Respondent's tracks which are situated immediately to the south (Tr. 19, 155). Immediately to the south of Respondent's tracks and paralleling them is Jefferson Boulevard (Tr. 88, 155). The two streets and Respondent's tracks approach the Southwest 23rd Street crossing straight from the east and the terrain is level and unobstructed for at least one-half mile (Tr. 155, 163, 166, 167).

The Southwest 23rd Street crossing on that day was blanketed with all sizes and types of signs, elec-

trical and painted, and with electrical and mechanical signaling devices (Tr. 19, 122, 123, 165, 166).[1] The electrical and mechanical signaling devices were operated by an electrical current which activated them when a train approching from the east reached a point 2,474 feet from the crossing (Tr. 19). Respondent had maintained these electrical devices at this crossing for a period of at least 10 years prior to the collision (Tr. 75, 82). These devices, in addition to the multitude of printed signs, were unobstructed and clearly visible to motorists traveling west on West Main Street (U.S. 80) and approaching this crossing at Southwest 23rd Street (Tr. 122, 166). In approaching and upon reaching the intersection with Southwest 23rd Street, but prior to entering the intersection, the flashing lights of the warning signals located on the southeast corner of the crossing became plainly visible (Tr. 116, 165, 166). Also, on that day as one approached the intersection from the east he was confronted by a three foot by two foot sign positioned on the southwest corner of the intersection at an angle facing such oncoming traffic and containing the words "DANGER TWO TRACKS WATCH FOR TRAIN ON EACH TRACK" (Tr. 19, 122, 166).

The intersection itself was uncontrolled in that there were no traffic signals located there (Tr. 4). Automobiles approaching from the east, as was Roger McBeth, and desiring to turn left, had to cross two traffic lanes (Tr. 5). The distance from the center of West Main Street (U.S. 80) to the nearest rail of

[1]See pages 12-14 of Appellee's Brief for a complete description of this crossing and its warning signs and devices.

Respondent's tracks was more than 100 feet (Tr. 21), and the distance from the south curb line to the nearest rail was 60 feet (Tr. 80 [P. 7, Petitioner's First Request for Admissions], 82).

Thus, as Roger McBeth traveled west on West Main Street (U.S. 80) toward the Southwest 23rd Street intersection and crossing, he could have observed from approximately one-half mile away, and at all times thereafter, that the crossing over which he must subsequently pass had signal lights and signs posted there to warn him and other travelers of railway traffic which might be traveling thereon (Tr. 2, 19, 86, 99, 124, 125, 155, 166, 176-178).

Respondent's passenger train No. 3 consisting of two diesel units and five cars was also approaching the crossing from the east (Tr. 34, 48, 79, 82). The train was traveling on the northern of two sets of parallel tracks (Tr. 2, 155) at a speed of 55 miles per hour, which was five miles per hour below the speed limit (Tr. 79).

While Roger McBeth and Respondent's train were approaching from the east, Andrew J. Renaker, Jr. was driving north on Southwest 23rd Street in a 1963 Ford Pickup, and was about to cross Respondent's tracks with the intention of turning right on West Main Street (U.S. 80) and proceeding on to his place of employment (Tr. 86). Just before Renaker reached the tracks, he observed Respondent's signal lights come on and begin flashing (Tr. 86). These signals, it will be remembered, were initiated by an electrical current when a train approaching from the

east reached a point 2,474 feet from the crossing (Tr. 19). Looking to the east Renaker saw the train approaching with its two headlights burning (Tr. 36). Proceeding on across the tracks Renaker stopped behind an automobile at the intersection which was waiting for the traffic to clear on West Main Street (U.S. 80) (Tr. 86). Generally speaking, the traffic was the usual heavy morning traffic (Tr. 4). After a very short time the automobile in front of Renaker moved out (Tr. 86). Almost immediately thereafter Renaker observed a Chevrolet approaching the intersection from the east on West Main Street (U.S. 80) (Tr. 86). The Chevrolet was occupied by one person, later identified as Roger McBeth (Tr. 87). The Chevrolet upon reaching the intersection proceeded to make a left turn and continue south on Southwest 23rd Street toward the tracks (Tr. 86-87).

At this point, one must remember that the warning lights located at the crossing had been flashing on and off for some time before Roger McBeth reached the intersection prior to his turn (Tr. 86-87). The record conclusively establishes that the warning lights on the southeast corner of the crossing were visible to motorists approaching from the east on West Main Street (U.S. 80) before reaching the Southwest 23rd Street intersection and before having an opportunity to turn left and proceed across Respondent's tracks (Tr. 122, 165, 166). Of great significance is the fact that no statement is to be found in the affidavits placed into the record by Petitioner that the southeast signal lights *were not visible*[2] prior to reaching the

[2]Emphasis ours throughout unless otherwise indicated.

intersection and at all times thereafter. The physical facts established by the record and a common understanding of light dispersion dictate that these lights were visible (Tr. 165, 166). In fact, Petitioner admitted that the signal lights could be seen from the intersection (Tr. 119), the center of which was over 100 feet from Respondent's nearest rail (Tr. 21).

Also, the record conclusively establishes and without dispute that Roger McBeth was no stranger to this neighborhood (Tr. 68, 69, 72). He was in a familiar environment (Tr. 68, 69, 72). He had been approaching this clearly visible and unobstructed crossing for at least one-half mile (Tr. 155, 163, 166, 167).

Thus, Roger McBeth reached the intersection with Respondent's clearly visible, warning lights flashing in his face and made his turn and headed toward Respondent's tracks. Nothing in the record remotely suggests that the movement of Roger McBeth's automobile was affected by the traffic as he made his left turn that morning. Renaker observed as Roger McBeth passed him that the red lights on Respondent's signaling device were still flashing on and off (Tr. 86).

The Engineer of Respondent's train first observed Roger McBeth's Chevrolet as it moved past Renaker's pickup (Tr. 80, 82). The train was then some 80 feet east of the crossing and still approaching at 55 miles per hour, five miles per hour less than the speed limit (Tr. 79, 80, 82, 90). The instant he saw the Chevrolet Respondent's Engineer threw the emergency brake and placed the entire train in emergency stop (Tr. 80, 82, 90).

Roger McBeth never stopped (Tr. 86, 88). From the time Renaker first observed Roger McBeth, he neither slowed nor increased the speed of his automobile, which was estimated by Renaker at 20 to 25 miles per hour (Supp. Tr. 2). Nothing in the record indicates that Roger McBeth at any time attempted to turn his automobile in any direction away from Respondent's tracks (Tr. 86-88, 90). Roger McBeth approached the tracks and proceeded to go across (Tr. 86, 88) neither looking to the east nor to the west at any time (Tr. 86).

Charles S. Johnson, a student at Arlington State College, driving west on West Jefferson Street, observed Roger McBeth's automobile for the first time as it approached the tracks (Tr. 88). Just prior to this time Johnson had been observing Respondent's train traveling west on the tracks to his right (Tr. 88). He had also observed that the signal lights at the Southwest 23rd Street crossing were flashing a color unidentifiable to him because of red and green color blindness (Tr. 88). Johnson noted that Roger McBeth did not stop before going on the tracks (Tr. 88). His automobile never varied its speed (Tr. 88).

Just as Roger McBeth's automobile was almost across Respondent's northern set of tracks, it was struck in the left rear quarterpanel by Respondent's train (Tr. 87, 88, 135). He was thrown out of his automobile and onto the roadbed (Tr. 3).

The record is void of any evidence indicating or inferring that Roger McBeth made the slightest attempt to avoid colliding with Respondent's train. Nothing in

the record shows that he attempted to stop his automobile within 50 feet but not less than 15 feet of Respondent's nearest rail as required by Texas law.[3] Nothing in the record shows that he was cognizant of his surroundings. Everything to be found in the record indicates that he was completely oblivious to what was going on about him. Immediately before reaching the intersection and for at least 100 feet while heading directly toward Respondent's tracks, the flashing signal lights were visible to him. In covering this 100 feet distance to Respondent's nearest rail, the slightest turn of the head or glance of the eye to the left would have revealed Respondent's approaching train, which was in hazardous proximity to the crossing (Tr. 165, 166, 167).

This record fails to contain anything which a court could consider or from which an inference might be drawn that Roger McBeth was in an impossible situation or operating under a sudden emergency so that he was unable to avoid the collision. But, even if the record indicated such, the same record establishes conclusively that Roger McBeth's own negligence caused such situation and this negligence was the proximate cause of the collision.

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[3]Article 6701d, § 86 (a) and (d), Revised Civil Statutes of Texas.

Article 6701d, Section 86(a) and (d), Revised Civil Statutes of Texas, and the Undisputed Facts

Article 6701d, Section 86, Revised Civil Statutes of Texas, provides in part as follows:

> "Sec. 86. Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when:
>
> "(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;
>
> * * *
>
> "(d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

In light of the statute and the undisputed facts established by this record, the trial court, the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the Supreme Court of Texas had no choice but to grant and sustain, respectively, Respondent's motion for summary judgment. Not only was Roger McBeth's conduct statutory contributory negligence as a matter of law, but these same actions most assuredly constituted common law contributory negligence. Thus, the undisputed facts preclude any recovery by Petitioner from Respondent.

REASONS FOR NOT GRANTING THE WRIT

Texas and Federal Summary Judgment Practice

Rule 166-A, Texas Rules of Civil Procedure, which authorizes a summary judgment in a civil suit in Texas, and is the rule upon which the trial court acted in this case, is patterned after Rule 56, Federal Rules of Civil Procedure, 28 U.S.C. A comparison of the two rules reveals that the language in each is almost identical.

The constitutionality of such a rule was passed upon by this Honorable Court in *Fidelity & Deposit Company of Maryland v. United States*, 187 U.S. 315 (1902). The opinion reads in part as follows:

> "In *Smoot v. Rittenhouse* [27 Wash.L.Rep. 741] the validity of the rule was sustained, as well as the power of the court to make it. If it were true that the rule deprived the plaintiff in error of the *right* [emphasis that of the author of the opinion] of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues." 187 U.S. 319-320.

Additionally, the vigorous language in the opinion of this Court in *Ex Parte Peterson*, 253 U.S. 300 (1920) can leave no doubt that the summary judgment procedure provided in Rule 56 does not infringe the constitutional right of trial by jury. The opinion reads in part as follows:

> "The commandment of the 7th Amendment that 'the right of trial by jury shall be preserved' does

not require that old forms of practice and procedure be retained. [Authorities omitted]. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

". . . No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon." 253 U.S. 309-310.

See also *Page v. Work*, 9 Cir., 290 F. 2d 323 (1961), cert. den. 368 U.S. 875; *King v. United Benefit Fire Insurance Company*, 10 Cir., 377 F. 2d 728 (1967); *Lindsey v. Leavy*, 9 Cir., 149 F. 2d 899 (1945); *Moore, Federal Practice*, Vol. 6, § 56.06, pp. 2075-2080; *Barron & Holtzhoff, Federal Practice and Procedure*, Vol. 3, § 1234, p. 137, holding and supporting the foregoing.

The Courts of Texas in interpreting and implementing the Texas Rules of Civil Procedure often look to the Federal counterpart and the interpretation made

by the Federal Courts thereunder. An examination of the cases interpreting Federal Rule 56 and the Texas Rule 166-A, reveals that they are almost identical. The Texas cases considering the question of whether or not the granting of a summary judgment is a denial of right to trial by jury have held that it is not. *Wyche v. Works*, Tex.Civ.App., 373 S.W. 2d 558, 561 (Dallas, 1963), writ refused, n.r.e.; *Schroeder v. Texas & Pac. R. Co.*, Tex.Civ.App., 243 S.W. 2d 261, 263 (Dallas, 1951), no writ history.

In view of the fact that the right of trial by jury is the keystone of our judicial system, Respondent would be the last to ever deny that right to any litigant. But, it must be remembered that the sole function of a jury is to decide issues of fact, and if there are no fact issues to be decided *with respect to a motion for summary judgment*, then the jury has no part in the litigation. *Wyche v. Works*, Tex.Civ.App., 373 S.W. 2d 558, 561 (Dallas, 1963), writ refused, n.r.e.

Policy in Support of Summary Judgment

The record before this Court shows that the case was properly decided by the Texas Courts. The guidelines and criteria looked to by the Texas Courts in granting and sustaining Respondent's motion for summary judgment were not only consistent with Texas law and practice, but with the Federal law and practice. Further, the Supreme Court of the United States should not review cases from the various jurisdictions wherein the sole point presented is the propriety of the granting of a motion for summary judg-

ment. In particular, this should be so where the case has been considered by several reviewing Courts. In the instant case, Petitioner has already had his objection to Respondent's motion for summary judgment considered by 13 Judges, one more person than he would have on a jury, and his objection found wanting for merit. Respondent would add that if the proceedings before the trial court be considered a trial before the Court without a jury, it was because the Petitioner made it one (Tr. 185, 190-200), and he should not be able to complain of this.

Fourteenth Amendment Due Process and the Seventh Amendment

While Respondent takes the position that Petitioner has not been denied a right of trial by jury in that certain undisputed facts establish a defense which precludes any recovery by Petitioner from Respondent, Respondent invites the Court's attention to the fact that this Honorable Court has not read the Seventh Amendment into the due process clause of the Fourteenth Amendment. This Court has held that the Seventh Amendment applies only to trials in the Federal Courts. *Bute v. People of the State of Illinois*, 333 U.S. 640 (1948). Further, this Court has held that the State Courts may modify or abolish altogether trial by jury in civil actions. *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Maxwell v. Dow*, 176 U.S. 581 (1900); *New York Central Railroad Company v. White*, 243 U.S. 188 (1917); *Wagner Electric Manufacturing Company v. Lyndon*, 262 U.S. 226 (1923).

And, finally, this Court has held that a denial of trial by jury in a State Court is not a denial of due process under the Fourteenth Amendment. *Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Company*, 284 U.S. 151 (1931).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Honorable Court refuse to grant a Writ of Certiorari in this case and by so refusing affirm the judgments of the Courts of the State of Texas.

Respectfully submitted,

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